Office of the State Appellate Defender

Illinois Criminal Law Digest

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court

Illinois Supreme Court

Illinois Appellate Court

ACCOUNTABILITY

§1-2

People v. Ulloa, 2015 IL App (1st) 131632 (No. 1-13-1632, 6/30/15)

To prove the offense of conspiracy to deliver cocaine, the State must prove that defendant himself agreed to the delivery. 720 ILCS 570/405.1. The State cannot prove conspiracy to deliver by showing that defendant was accountable for the actions of another person who agreed to the delivery. The trial court thus committed plain error under both the closely balanced evidence and serious error prongs by instructing the jury that they could find defendant guilty of conspiracy under a theory of accountability.

APPEAL

§2-2(a)

In re Isiah D., 2105 IL App (1st) 143507 (No. 1-14-3507, 6/8/15)

On appeal from a 2014 order finding him to be a habitual juvenile offender and a violent juvenile offender, the minor respondent argued that the conviction resulting from his guilty plea in 2013 could not be used as a predicate for HJO and VJO status because the plea admonishments had been improper. The court concluded that under **In re J.T.**, 221 Ill.2d 338, 851 N.E.2d 1 (2006), it lacked jurisdiction to consider issues arising from the 2013 plea because respondent failed to file a timely appeal from that proceeding. The court concluded that **J.T.** implicitly overruled **In re J.W.**, 164 Ill.App.3d 826, 518 N.E.2d 310 (1st Dist. 1987), which found that the Appellate Court had jurisdiction to consider the propriety of a prior guilty plea that was used as a predicate in a subsequent case.

The court noted that because minors have not been held to come within the Post-Conviction Hearing Act, respondent was effectively left without a remedy unless the Supreme Court saw fit to exercise supervisory authority.

(Respondent was represented by Assistant Defender Kathleen Weck, Chicago.)

§2-6(e)

People v. Robinson, 2015 IL App (1st) 130837 (No. 1-13-0837, 6/26/15)

In **People v. Jolly**, 2014 IL 117142, the Illinois Supreme Court held that where the State's participation in a **Krankel** hearing is "anything more than *de minimis*," there is an unacceptable risk that the hearing will be turned into an adversarial proceeding,

where both the State and trial counsel oppose the defendant. It is reversible error if the State is allowed to participate in an adversarial manner.

The Appellate Court held that the decision in **Jolly** applied retroactively since it did not announce a new rule of criminal procedure, but instead simply applied a well-established principle to the facts of Jolly's case.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

BATTERY, ASSAULT & STALKING OFFENSES

§7-1(a)(1)

People v. Gonzalez, 2015 IL App (1st) 132452 (No. 1-13-2452, 6/30/15)

1. Two police officers in a squad car approached a group of 10 men standing in the middle of the street. One of the officers testified that all of the men were throwing bricks and bottles into the street at passing cars while shouting gang slogans. The other officer saw the men in the middle of the street, but did not see any of them throw bricks.

Both officers testified that a group of pedestrians approached the 10 men and then turned and walked the other direction. When the officers exited their car, six of the 10 men ran away while the other four, including defendant, dropped their bricks and approached the officers. On cross, the officer testified that he did not actually see any of the four men who approached the officers throw a brick at a car.

2. The Appellate Court held that the State failed to prove defendant guilty of reckless conduct, which requires proof that defendant recklessly performed an act that endangered the safety of another person. 720 ILCS 5/12-5(a)(1). The first officer testified inconsistently, at one point saying he saw the defendants throwing bricks and at another point saying he did not see them throwing bricks. Even his testimony about seeing "the defendants" throwing bricks concerned the actions of the 10 men as a group and did not distinguish between defendant and any of the other men. And the second officer testified that he didn't see anyone throwing bricks. Under these circumstances, the State failed to prove defendant guilty of reckless endangerment.

3. Even assuming defendant threw bricks at passing cars, the State also failed to prove that these actions endangered the safety of other people. There was no evidence of any complaints about personal or property damage, and no testimony that the bricks struck any cars or pedestrians. None of the pedestrian who turned around and walked the other way testified that they believed their safety was endangered. Under these facts, it would have been mere speculation that anyone felt endangered by defendant's alleged actions.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

§7-1(a)(1)

People v. Taylor, 2015 IL App (1st) 131290 (No. 1-13-1290, 6/19/15)

1. To sustain a conviction for aggravated assault, the State must prove beyond a reasonable doubt that the defendant, with knowledge that a peace officer was performing official duties, knowingly and without authority engaged in conduct which placed the officer in reasonable apprehension of receiving a battery. 720 ILCS 5/12–2(b)(4)(i). Whether the officer is placed in reasonable apprehension of receiving a battery is judged on an objective standard. In other words, an officer is placed in reasonable apprehension of receiving a battery where, under the circumstances, a reasonable person would have been placed in such apprehension.

Where defendant challenges the sufficiency of the evidence to sustain a conviction, the reviewing court must consider whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime had been proven beyond a reasonable doubt. A reviewing court must accept any reasonable inferences from the record in favor of the prosecution and may overturn the trier of fact's decision only if the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt.

2. Under Illinois law, words alone are usually insufficient to constitute an assault. Instead, some action or condition must accompany the words. Where defendant engaged in no actions toward a deputy, but instead was leaving the courthouse as she had been ordered, there was no basis on which a reasonable trier of fact could have found that a reasonable officer would fear receiving a battery.

The court acknowledged that defendant said "I'm going to get you" and "I am going to kick your ass," but noted that when those statements were made defendant had complied with the deputy's order to leave the courthouse and was outside two automatic airlock doors. Furthermore, defendant was unarmed, made no threatening gestures, and was seven to ten feet away from the officer.

Defendant's conviction for aggravated assault was reversed.

(Defendant was represented by Assistant Defender Philip Payne, Chicago.)

COLLATERAL REMEDIES

§9-1(e)(2)

People v. Romero, 2015 IL App (1st) 140205 (No. 1-14-0205, 6/22/15)

To avoid summary dismissal, a post-conviction petition alleging ineffective assistance of trial or appellate counsel must present an arguable claim that counsel's performance was objectively unreasonable and caused prejudice. Construing the petition in this case liberally, the court concluded that defendant made an arguable claim that trial and appellate counsel were ineffective for failing to argue that the trial court considered an improper factor when imposing sentence.

Defendant was acquitted of attempt murder for firing shots at officers who were pursuing him, but was convicted of aggravated discharge of a firearm and aggravated battery with a firearm. In imposing sentence, the trial court stated that although the jury found the defendant did not intend to kill the officer, one shot hit the officer in the collar bone close to the face and "could have caused a whole lot more damage." The trial judge added, "Fortunately for [the officer] the defendant was a little worse shot than he thought he would have been."

The Appellate Court concluded that the petition made an arguable claim that trial and appellate counsel were ineffective for failing to assert that the trial court relied on a factor of which defendant had been acquitted. The court concluded that the judge's statement that "defendant was a little worse shot than he thought" indicated that at the very least, the trial court believed that defendant intended that the shot strike the officer. In addition, the statement arguably showed that despite the jury's acquittal on attempt murder, the trial court relied on its personal opinion concerning that offense.

In either event, trial counsel acted unreasonably by failing to raise the issue at the sentencing hearing and appellate counsel acted unreasonably by failing to raise the issue as plain error on appeal. In addition, defendant was prejudiced because his sentence was increased due to consideration of an improper factor. The order dismissing the post-conviction petition was reversed and the cause remanded for second-stage proceedings.

CONSPIRACY & SOLICITATION

§11-1

People v. Ulloa, 2015 IL App (1st) 131632 (No. 1-13-1632, 6/30/15)

To prove the offense of conspiracy to deliver cocaine, the State must prove that defendant himself agreed to the delivery. 720 ILCS 570/405.1. The State cannot prove conspiracy to deliver by showing that defendant was accountable for the actions of another person who agreed to the delivery. The trial court thus committed plain error

under both the closely balanced evidence and serious error prongs by instructing the jury that they could find defendant guilty of conspiracy under a theory of accountability.

COUNSEL

§13-4(a)(3)
People v. Robinson, 2015 IL App (1st) 130837 (No. 1-13-0837, 6/26/15)

1. When a defendant makes a post-trial claim of ineffective assistance of counsel, the trial court must conduct a **Krankel** inquiry to examine the factual basis of the claim. The **Krankel** inquiry may include trial counsel's answers and explanations and a brief discussion between the court and defendant.

In **People v. Jolly**, 2014 IL 117142, the Illinois Supreme Court held that a **Krankel** hearing "should operate as a neutral and nonadversarial proceeding." Where the State's participation is "anything more than *de minimis*," there is an unacceptable risk that the hearing will be turned into an adversarial proceeding, where both the State and trial counsel oppose the defendant. It is reversible error if the State is allowed to participate in an adversarial manner.

2. Although the **Krankel** hearing in the present case occurred before the **Jolly** decision, the Appellate Court held that **Jolly** applied retroactively since it did not announce a new rule of criminal procedure, but instead simply applied a well-established principle to Jolly's case.

3. Here the trial court committed reversible error by allowing the State to take an adversarial position against defendant. The trial court asked for the State's comments, and the State argued directly against defendant's claims. By doing so, the State's participation changed the "hearing from an objective or neutral inquiry into and adversarial inquiry."

Where the State has been allowed to take an adversarial position, the appropriate remedy under **Jolly** is to remand for a new hearing before a different judge.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

§13-5(d)(3)(a)(1)

People v. Washington, 2015 IL App (1st) 131023 (No. 1-13-1023, 6/30/15)

1. Where defendant makes a *pro se* post-trial allegation of ineffective assistance of counsel, the trial court must conduct an adequate inquiry into the factual basis for the claim. **People v. Krankel**, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). To invoke the **Krankel** rule, defendant must allege ineffective assistance of counsel and provide some factual support for the allegation. The pleading requirements for raising a *pro se* claim of ineffectiveness are relaxed, but the defendant must satisfy "minimum requirements."

Mere awareness by the trial court that defendant has complained about counsel's representation imposes no duty to *sua sponte* investigate defendant's concerns. However, there is no requirement that **Krankel** motions be placed in writing.

2. When asked if he wanted to make a statement in allocution at sentencing, defendant replied that he wanted to make a "verbal motion" of ineffective assistance of counsel and that he did not have access to the law library. The trial court responded by stating that "all motions are required to be in writing" and that defense counsel "did a fine job for you." The judge added that although defense counsel "has been anything but ineffective," defendant could not be prevented from filing a written motion.

The trial judge did not ask defendant for the basis of his claim of ineffectiveness. Defendant responded to the judge's statements by saying that he would "have to" withdraw the motion and proceed to sentencing.

The Appellate Court concluded that the trial judge erred by stating that a *Krankel* motion must be in writing and by failing to question defendant about his claim. An oral motion is permissible so long as it sufficiently brings the claim to the trial court's attention. Here, defendant's statement was sufficient to bring the claim to the trial court's attention and to trigger a duty to ascertain the basis for the claim.

Because the trial court failed to conduct any inquiry, there is no way to know the nature of the defendant's complaint or whether further inquiry or appointment of counsel was required. Thus, a remand for a proper **Krankel** inquiry was required.

3. The court rejected the State's argument that the trial court conducted an adequate **Krankel** hearing when it stated that counsel's performance was "anything but ineffective." Although a trial court may make a determination of counsel's performance based on its knowledge of counsel's performance at trial, such action is possible only where the trial judge is aware of the specific basis for the defendant's complaint. Where the trial court failed to make any inquiry to determine the basis of the complaint, and instead informed defendant that he would have to raise his motion in writing, the judge lacked a sufficient basis to determine whether counsel had been ineffective.

4. The court also rejected the State's argument that defendant waived the **Krankel** claim by withdrawing his motion after the trial court stated that a written motion was required. The court found that the withdrawal was not voluntary where it was made in response to the judge's erroneous statement that a written motion was required. "We cannot find waiver where a defendant acquiesces to an erroneous filing requirement insisted upon by the court."

(Defendant was represented by Assistant Defender Ben Wolowski, Chicago.)

DISCOVERY

§15-8

People v. Olsen, 2015 IL App (2d) 140267 (No. 2-14-0267, 6/5/15)

Section 30(c) of the State Police Act provides that in-car video recording equipment shall record activities outside a patrol case when an officer (1) is conducting an enforcement stop or (2) reasonably believes a recording may assist the prosecution, enhance safety, or for any other lawful purpose. 20 ILCS 2610/30(c).

The police stopped defendant for a traffic violation and performed field sobriety tests on defendant. Although the in-car video was running, the officer, for safety reasons, conducted the sobriety tests in front of defendant's car so that none of the tests were capable of being seen on the video recording. Defendant argued that the officer's failure to record the sobriety tests amounted to "spoilation of evidence" by failing to "properly preserve evidence" as required by the statute. As a remedy for the discovery violation, defendant requested that the court suppress all of the officer's observations during the tests.

The Appellate Court held that there was no discovery violation since the State fully complied with discovery by turning over the videotape. Although the field sobriety tests were not visible on the tape, there was no evidence that the officer conducted the tests if front of defendant's car for any reason other than safety. The statute requires that traffic stops be recorded, but stops are conducted under a variety of conditions and there is no way for an officer to guarantee that all relevant facts will be recorded.

The trial court's order suppressing the evidence was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

DOUBLE JEOPARDY

§§17-1, 17-6

People v. Brown, 2015 IL App (1st) 134049 (No. 1-13-4049, 6/22/15)

Defendant was prosecuted in separate trials on charges arising from a 2007 gun battle which defendant initiated with three persons. At the first trial, defendant was convicted of aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm for shooting at Terrell Spencer, and was also convicted of two counts of aggravated discharge of a firearm for shooting in the direction of Michael Dixon and Jarrett Swift. However, defendant was granted a directed verdict on charges of attempt murder, aggravated battery with a firearm, aggravated battery, and aggravated discharge of a firearm relating to the shooting of Mycal Hunter, a bystander who was struck in the neck by a bullet. The trial court stated that there was insufficient evidence to show that defendant fired the shots which struck Hunter.

After the first trial was completed, Hunter died. Defendant was then tried for first degree murder based on two counts of knowing murder and five counts of felony murder predicated on the five felony convictions which he received in the first trial for offenses committed against Spencer, Dixon and Swift.

The court rejected arguments that double jeopardy and collateral estoppel barred a trial for murder after defendant was acquitted in the first trial of offenses against the same person.

1. The Illinois and Federal constitutions provide that no person shall be put twice in jeopardy for the same offense. In a bench trial, jeopardy attaches when the first witness is sworn and the court begins to hear evidence. Entry of a directed verdict is an "acquittal" for double jeopardy purposes where the basis for the verdict is insufficient evidence to establish some or all of the essential elements of the crime.

Illinois statutory law also provides that a prosecution is barred if the defendant was formerly prosecuted for the same offense based on the same facts and the prior prosecution resulted in an acquittal or a determination that the evidence was insufficient to warrant a conviction. 720 ILCS 5/3-4(a)(1). A prosecution for a different offense is barred where a former prosecution was for an offense that involved the same conduct unless each prosecution requires proof of a fact not required for the other or "the offense was not consummated when the former trial began." 720 ILCS 5/3-4(b)(1).

The court held that §3-4(b)(1) embodies an exception to double jeopardy principles recognized in **Diaz v. United States**, 223 U.S. 442 (1912), where the United States Supreme Court found that a subsequent trial is permissible where at the time of the first trial, the prosecution could not have proceeded on the charge brought in the subsequent trial because additional facts necessary to sustain that charge had not yet occurred.

Because a murder prosecution cannot commence until the victim's death has occurred, the court concluded that the **Diaz** exception and §3-4(b)(1) applied. Thus, double jeopardy was not violated where defendant was prosecuted for murder after the decedent's death although he had been acquitted of related offenses at a trial which occurred while the decedent was still alive.

2. In a criminal context, collateral estoppel is a component of double jeopardy. The collateral estoppel doctrine holds that once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot be relitigated between the same parties in a subsequent lawsuit. A party who seeks to invoke collateral estoppel must show that the issue was raised and litigated in a prior proceeding, determination of the issue was a critical and necessary part of the final judgment in that proceeding, and the issue sought to be precluded in the later trial is the same as the issue decided in the prior trial. Where the defendant claims that a previous acquittal bars a subsequent prosecution for a related offense, the collateral estoppel rule requires a court to examine the record of the prior proceeding and determine whether a rational jury could have grounded its verdict on an issue other than the one which the defendant seeks to foreclose from consideration.

A directed verdict in favor of the defendant constitutes an "acquittal" where the verdict was based on a finding that there was insufficient evidence concerning an essential element of the crime. Thus, the directed verdict in the first trial has preclusive effect under the collateral estoppel doctrine to the extent that it represented a determination that there was insufficient evidence to sustain an element of a charged offense.

Because intent to kill is an element of attempt murder, the directed verdict on attempt murder in the first trial precluded relitigation concerning whether defendant intended to kill the decedent. Thus, in the second trial the State was estopped from prosecuting defendant for intentional first degree murder.

The acquittal for attempt murder did not preclude a subsequent prosecution for first degree murder based on knowledge that the shooting created a strong probability of death or great bodily harm. However, such charges could not be brought in the second trial because in the first trial, defendant was acquitted of charges (aggravated battery, aggravated battery of a firearm, and aggravated discharge of a firearm) which required a knowing mental state and which were directed toward Hunter. Because the acquittals on these offenses were based on the trial court's finding that there was insufficient evidence to show that defendant knowingly caused Hunter's injuries, the collateral estoppel doctrine precluded a subsequent prosecution for knowing murder.

However, the acquittals for attempt murder and offenses based on knowledge did not preclude a subsequent prosecution for felony murder predicated on the convictions obtained in the first trial against persons other than Hunter. Felony murder does not require a particular mental state, but only that the defendant was committing a forcible felony when he committed the acts which resulted in death. Furthermore, under the

Illinois "proximate cause" theory, liability for felony murder attaches for any death which proximately results from unlawful activity initiated by the defendant, even if the killing was performed by the intended victim of the crime. Thus, where defendant was convicted of five felonies for initiating a shootout with individuals other than Hunter, and Hunter died in the course of those felonies, defendant could be prosecuted for felony murder whether or not he fired the shot which hit Hunter.

3. The court noted, however, that the single act of shooting Hunter could not support three separate felony murder convictions. The court vacated two counts of felony murder, affirmed the conviction for felony murder predicated on aggravated battery with a firearm directed against Spencer, and remanded the cause for re-sentencing.

EVIDENCE

§19-10(b)

Ohio v. Clark, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2015) (No. 13-1352, 6/18/15)

1. The Sixth Amendment Confrontation Clause generally prohibits the introduction of testimonial statements by a witness who does not testify at trial. Under the "primary purpose" test, statements elicited through interrogation are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

When the primary purpose of the interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus statements elicited in response to such interrogation are not prohibited by the Confrontation Clause. But the "existence *vel non* of an ongoing emergency" is not the end of the inquiry; it is just one factor in the ultimate question about the primary purpose of the interrogation.

2. Teachers at L.P.'s preschool observed suspicious marks on his body and asked him who was responsible. L.P., who was three years old, eventually made statements to the teachers implicating defendant. These statements were introduced at trial, but L.P. did not testify. Defendant argued that the statements were testimonial and thus prohibited by the Confrontation Clause.

3. The Supreme Court held that the statements were not testimonial. The Court declined to adopt a categorical rule that statements made to persons other than law enforcement officers are never testimonial. But, such statements are much less likely to be testimonial. And considering all the relevant circumstances in this case, L.P.'s statements "clearly were not made with the primary purpose of creating evidence for [defendant's] prosecution," and thus were not barred by the Sixth Amendment.

First, the statements were made in the context of an ongoing emergency about suspected child abuse. When the teachers saw the injuries, they needed to know whether it was safe to release L.P. to his guardian at the end of the day. Their immediate concern was to protect L.P. by identifying and ending the abuse.

Second, there was no evidence that the primary purpose was to gather evidence for defendant's prosecution. The teachers never informed L.P. that his answers would be used to arrest or punish the abuser, and L.P. never indicated that he intended his statements to be used in a prosecution.

Third, L.P.'s young age contributed to the finding that the statements were not testimonial. "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." Few three-year-old children understand the criminal justice system and it is unlikely that someone that young would intend his statements to be a substitute for trial testimony.

Finally, the Court found it highly relevant, if not categorically dispositive, that L.P. was speaking to teachers rather than law enforcement officers. Statements to persons who are not "principally charged with and uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."

In light of all these circumstances, the Court held that the introduction of L.P.'s statements did not violate the Sixth Amendment.

4. The Court specifically rejected two of defendant's arguments. First, Ohio's mandatory reporting obligations for teachers did not turn their questions into the equivalent of police interrogation. Even with this obligation, the teacher's overriding concern "was to protect L.P. and remove him from harm's way." Such reporting statutes cannot convert concerned questions from a teacher "into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Second, the Court refused to view this issue from the jury's perspective. Doing so would make virtually all out-of-court statements testimonial. The prosecution typically offers those statements when they support its case, and in this context, the context the jury sees, all such statements could be viewed as testimonial. But the Court has never suggested that the Confrontation Clause bars all out-of-court statements that support the prosecution's case. Such a broad rule would eliminate the primary purpose test.

JURY

§32-6(a)

People v. Peoples, 2015 IL App (1st) 121717 (No. 1-12-1717, 6/30/15)

1. The State charged defendant with first degree murder and a firearm enhancement alleging that he personally discharged a firearm that proximately caused death. Six witnesses testified at trial that the fatal shots were fired from a white van. Three of those witnesses identified defendant as being one of the men in the van and of those three, two testified that defendant fired a gun. The State charged defendant as the principal and argued that he personally fired the fatal shots. The State never argued or pursued a theory at trial that defendant was accountable for the shooting and did not request accountability instructions.

During deliberations, the jury sent a note asking whether someone can be guilty of murder and "not pull the trigger." The note further stated that "we are struggling with the concept of a guilty verdict but not having enough evidence that shows or proves [defendant] was the shooter." Over defendant's objection, the court answered the jury's question: "Dear Jury, the answer is Yes." Five minutes later the jury found defendant guilty of first degree murder, but acquitted him of the firearm enhancement.

2. The Appellate Court held that the trial court's response to the jury's question was incorrect. Under the facts of this case, where the State never pursued a theory of accountability at trial, it was improper to instruct the jury that it could convict on a theory of accountability. The Court also found that the error was not harmless beyond a reasonable doubt. There was a serious risk that defendant was convicted on a theory never presented to the jury and which defendant never had a chance to contest.

3. The Court, however, did not find that the error required an outright reversal of defendant's conviction. Although the guilty verdict on first degree murder conflicted with the acquittal of the firearm enhancement, legally inconsistent verdicts do not mandate outright reversal of a conviction. And even though the facts of this case strongly suggested that the jury did not believe defendant was the "principal shooter," such a conclusion would still be speculation, and a reviewing court "may not guess as to why a jury did what it did, no matter how obvious it may seem."

The Court remanded the case for a new trial.

(Defendant was represented by former Assistant Defenders Patrick Morales-Doyle and Rachel Moran, Chicago.)

§§32-8(a), 32-8(b)

People v. Downs, 2015 IL 117934 (No. 117934, 6/18/15)

1. The Federal Constitution does not require or prohibit a jury instruction defining reasonable doubt. A reasonable doubt instruction violates due process only if there is a reasonable likelihood that the jurors understood the instruction to allow conviction upon proof that is less than beyond a reasonable doubt.

Illinois, like some other jurisdictions, does not define reasonable doubt. The rationale behind this rule is that "reasonable doubt" is self-defining and needs no amplification. Thus, not only is there no IPI definition of "reasonable doubt," the Committee Notes state that no instruction should be given. IPI Criminal 4th No. 2.05, Committee Note.

2. During deliberations, the jury asked, "What is your definition of reasonable doubt, 80%, 70%, 60%?" The court concluded that the trial judge did not err by responding, "We cannot give you a definition[;] it is your duty to define." The court concluded that this answer was "unquestionably correct" in light of Illinois precedent that the jury should not be given a definition of reasonable doubt.

The court rejected the argument that error occurred in the context of this case because in view of the jury's reference to percentages ranging from 60 - 80%, the failure to provide a definition allowed the jury to use a standard that was less than reasonable doubt. The court noted the difficulty of giving a cogent definition of "reasonable doubt," and held that in its view "it is better to refrain" from giving a definition at all. The court also noted that defense counsel did not object to the trial court's response and that had error occurred the issue could only be reached as plain error.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

JUVENILE

§§33-5(d), 33-6(a), 33-6(c)

In re Isiah D., 2105 IL App (1st) 143507 (No. 1-14-3507, 6/8/15)

On appeal from a 2014 order finding him to be a habitual juvenile offender and a violent juvenile offender, the minor respondent argued that the conviction resulting from his guilty plea in 2013 could not be used as a predicate for HJO and VJO status because the plea admonishments had been improper. The court concluded that under **In re J.T.**, 221 Ill.2d 338, 851 N.E.2d 1 (2006), it lacked jurisdiction to consider issues arising from the 2013 plea because respondent failed to file a timely appeal from that proceeding. The court concluded that **J.T.** implicitly overruled **In re J.W.**, 164 Ill.App.3d 826, 518 N.E.2d 310 (1st Dist. 1987), which found that the Appellate Court had

jurisdiction to consider the propriety of a prior guilty plea that was used as a predicate in a subsequent case.

The court noted that because minors have not been held to come within the Post-Conviction Hearing Act, respondent was effectively left without a remedy unless the Supreme Court saw fit to exercise supervisory authority.

(Respondent was represented by Assistant Defender Kathleen Weck, Chicago.)

PROSECUTOR

§41-1

People v. Ringland, Pirro, Saxen, Harris and Flynn, 2015 IL App 130523 (Nos. 3-13-0523, 3-13-0823, 3-13-0848, 3-13-0926, & 3-13-0927, 6/3/15)

Section 3–9005(b) of the Counties Code provides that a State's Attorney may appoint one or more special investigators to "serve subpoenas, make return of process and conduct investigations which assist the States's Attorney in the performance of his duties." 55 ILCS 5/3-9005(b). Section 3-9005(b) also provides that such investigators "shall be peace officers" with powers authorized for investigators of the State's Attorneys Appellate Prosecutor. Investigators for the States Attorneys Appellate Prosecutor are peace officers and "have the powers possessed by policemen in cities and by sheriffs," but may "exercise such powers only after contact and cooperation with the appropriate law enforcement agencies." 725 ILCS 210/7.06(a).

The State's Attorney of LaSalle County appointed and equipped special investigators to staff the State's Attorney's Felony Enforcement unit. The purpose of the SAFE unit was to patrol highways which pass through the county, with the intent to enforce drug laws. The SAFE unit investigators were not sworn officers in LaSalle County, but were officers who had retired from various police departments.

A SAFE unit special investigator stopped defendant Ringland on Interstate 80 for driving with "inadequate mud flaps" and because the vehicle's rear license plate was obscured. A canine team was called, and cannabis was found when the car was searched after the canine alerted. The standard practice of the SAFE unit was to call for a canine unit whenever a traffic stop was made.

The other four defendants were stopped by the same investigator while traveling on I-80 on separate days. Each was charged with a drug offense after being stopped for a traffic violation.

The court concluded that the State's Attorney exceeded the scope of §3-9005(b) by creating the SAFE unit staffed by State's Attorney investigators. The court found

that the plain language of §3-9005(b) limits the functions of special investigators to serving subpoenas, making return of process, and conducting investigations that assist the State's Attorney in the performance of his or her duties. The court concluded that if the LaSalle County's State's Attorney's actions were permissible, these statutory limitations on the powers of special investigators would be superfluous because there would be no distinction between sworn police officers and special investigators of the State's Attorney's office.

The court added that the intent of §3-9005(b) is not to allow the State's Attorney to create his or her own police force, but to provide State's Attorney's investigators with police powers to the extent necessary to assist the State's Attorney in cases originated by traditional police agencies or where the police are unable or unwilling to investigate. Here, there was no evidence that the prosecutions were originated by traditional police agencies or that police were unable or unwilling to investigate the defendants' activities. Because the actions of the SAFE investigator exceeded statutory authority, the trial acted properly by granting the defendants' motions to suppress.

(Defendant Saxen was represented by Assistant Defender Dimitri Golfis, Ottawa.)

REASONABLE DOUBT

§42-5

People v. Gonzalez, 2015 IL App (1st) 132452 (No. 1-13-2452, 6/30/15)

1. Two police officers in a squad car approached a group of 10 men standing in the middle of the street. One of the officers testified that all of the men were throwing bricks and bottles into the street at passing cars while shouting gang slogans. The other officer saw the men in the middle of the street, but did not see any of them throw bricks.

Both officers testified that a group of pedestrians approached the 10 men and then turned and walked the other direction. When the officers exited their car, six of the 10 men ran away while the other four, including defendant, dropped their bricks and approached the officers. On cross, the officer testified that he did not actually see any of the four men who approached the officers throw a brick at a car.

2. The Appellate Court held that the State failed to prove defendant guilty of reckless conduct, which requires proof that defendant recklessly performed an act that endangered the safety of another person. 720 ILCS 5/12-5(a)(1). The first officer testified inconsistently, at one point saying he saw the defendants throwing bricks and at another point saying he did not see them throwing bricks. Even his testimony about seeing "the defendants" throwing bricks concerned the actions of the 10 men as a group and did not distinguish between defendant and any of the other men. And the second officer testified

that he didn't see anyone throwing bricks. Under these circumstances, the State failed to prove defendant guilty of reckless endangerment.

3. Even assuming defendant threw bricks at passing cars, the State also failed to prove that these actions endangered the safety of other people. There was no evidence of any complaints about personal or property damage, and no testimony that the bricks struck any cars or pedestrians. None of the pedestrian who turned around and walked the other way testified that they believed their safety was endangered. Under these facts, it would have been mere speculation that anyone felt endangered by defendant's alleged actions.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Linda Olthoff, Chicago.)

SEARCH & SEIZURE

§§44-1(c)(2), 44-7(a), 44-8(c)

People v. Harris, 2015 IL App (1st) 132162 (No. 1-13-2162, 6/17/15)

After a canine alerted to a FedEx package, officers obtained a warrant, opened the parcel, and found cannabis. The package was addressed to "S. Harris" at an address in Lincolnwood. The officers then obtained an anticipatory warrant authorizing a search of "Harris or anyone taking possession" of the package at the address and "any premises or vehicle . . . that the . . . parcel is brought into once the parcel has been delivered." The complaint stated that the warrant would be executed only if the parcel was "accepted" into a location or vehicle.

At the same time, officers obtained an order to install an "electronic monitoring and breakaway filament device" in the parcel. This device sends an electronic signal when a package is moved or opened. The officers then placed the package on the porch of the home to which it was addressed.

About an hour later, defendant, whose first initial was not "S," pulled into the driveway, retrieved the box, and put it in his vehicle. Defendant presented testimony that the house was owned by his grandmother, whose first name was "Sylvia," but that it had been empty for several years because Sylvia was in a nursing home. Defendant testified that as he was driving past the house he saw the package on the porch and decided to pick it up.

When defendant placed the package in his car, officers decided to execute the warrant although the electronic monitoring device did not indicate that the package had been opened or was being moved. The officers decided to act because "they did not

want to get into a car chase in an unfamiliar area around school dismissal time." However, no evidence was presented concerning the proximity of any schools to the house.

The State presented testimony that after he was arrested, defendant made inculpatory statements. Defendant denied making those statements. Defendant was convicted of possession of cannabis but acquitted of possession of cannabis with intent to deliver.

The Appellate Court concluded that defendant's motion to suppress, which was based on the assertion that the triggering condition for execution of the anticipatory warrant had not occurred, should have been granted.

1. An anticipatory search warrant is a warrant based on an affidavit which alleges that at a future time, probable cause will exist for a search with respect to a certain person or place. Execution of an anticipatory warrant is usually subject to the occurrence of a "triggering condition" other than the mere passage of time. The requirement of a triggering condition ensures that only searches justified by the presence of probable cause will occur.

The triggering condition need not be reflected on the face of the warrant, and may be placed in the supporting affidavits. However, anticipatory warrants are narrowly drawn to avoid premature execution as a result of manipulation or misunderstanding by the police. The purpose of defining a triggering event is to ensure that the officers who execute the warrant serve almost a "ministerial" role in deciding when the warrant should be executed.

2. The court concluded that the officers erred by making the arrest before the triggering event occurred. The warrant application stated that the warrant would be executed only if the package was "accepted" into a location or vehicle. Under **People v. Bui**, 381 Ill.App.3d 397, 885 N.E.2d 506 (1st Dist. 2008), under similar circumstances a package was "accepted" only when it was received and opened. The court concluded that the only actions attributed to defendant - picking up the package and placing it in his car - did not constitute "acceptance." Therefore, the triggering event had not occurred.

The court rejected the State's argument that the package was accepted when defendant displayed an intent to retain it, stating that such a rule would "cast a wide net" over people and locations which could be searched and would leave the warrant lacking sufficient particularity as to the person or location that could be searched. The court stressed that under the State's argument, officers would have discretion to search a neighbor who picked up the package to hold for the addressee, a thief who saw the package and decided to steal it, or a realtor who placed the package inside the front door when showing the home.

3. The court also concluded that the officers erred by executing the warrant without waiting until the electronic device attached to the package indicated that it had been

opened or moved. First, the electronic device provided objective evidence to identify the person or premises which could be searched under the warrant. Second, the objective evidence from the device limited the officers' discretion to determine whether the triggering event had occurred.

4. The court rejected the argument that the good faith exception applied and the evidence therefore need not be suppressed. The good faith exception to the exclusionary rule permits the admission of illegally-seized evidence where the officer had a reasonable belief that the search was authorized by a warrant.

The court concluded that the officers could not have reasonably believed that they were authorized to arrest defendant where they had personally participated in preparing the application for the warrant, including representing that the electronic monitoring and breakaway filament devices would likely "produce evidence of a crime," and knew that the device had not indicated that the package had been opened. In addition, the officers had no prior information to connect defendant to the package or its contents. Under these circumstances, the officers could not have reasonably believed that the warrant authorized a search of defendant merely because he picked up the package and put it in his car.

(Defendant was represented by Assistant Defender Michael Gentithes, Chicago.)

§44-3

People v. Ringland, Pirro, Saxen, Harris and Flynn, 2015 IL App 130523 (Nos. 3-13-0523, 3-13-0823, 3-13-0848, 3-13-0926, & 3-13-0927, 6/3/15)

Section 3-9005(b) of the Counties Code provides that a State's Attorney may appoint one or more special investigators to "serve subpoenas, make return of process and conduct investigations which assist the States's Attorney in the performance of his duties." 55 ILCS 5/3-9005(b). Section 3-9005(b) also provides that such investigators "shall be peace officers" with powers authorized for investigators of the State's Attorneys Appellate Prosecutor. Investigators for the States Attorneys Appellate Prosecutor are peace officers and "have the powers possessed by policemen in cities and by sheriffs," but may "exercise such powers only after contact and cooperation with the appropriate law enforcement agencies." 725 ILCS 210/7.06(a).

The State's Attorney of LaSalle County appointed and equipped special investigators to staff the State's Attorney's Felony Enforcement unit. The purpose of the SAFE unit was to patrol highways which pass through the county, with the intent to enforce drug laws. The SAFE unit investigators were not sworn officers in LaSalle County, but were officers who had retired from various police departments.

A SAFE unit special investigator stopped defendant Ringland on Interstate 80 for driving with "inadequate mud flaps" and because the vehicle's rear license plate was obscured. A canine team was called, and cannabis was found when the car was searched after the canine alerted. The standard practice of the SAFE unit was to call for a canine unit whenever a traffic stop was made.

The other four defendants were stopped by the same investigator while traveling on I-80 on separate days. Each was charged with a drug offense after being stopped for a traffic violation.

The court concluded that the State's Attorney exceeded the scope of §3-9005(b) by creating the SAFE unit staffed by State's Attorney investigators. The court found that the plain language of §3-9005(b) limits the functions of special investigators to serving subpoenas, making return of process, and conducting investigations that assist the State's Attorney in the performance of his or her duties. The court concluded that if the LaSalle County's State's Attorney's actions were permissible, these statutory limitations on the powers of special investigators would be superfluous because there would be no distinction between sworn police officers and special investigators of the State's Attorney's office.

The court added that the intent of §3-9005(b) is not to allow the State's Attorney to create his or her own police force, but to provide State's Attorney's investigators with police powers to the extent necessary to assist the State's Attorney in cases originated by traditional police agencies or where the police are unable or unwilling to investigate. Here, there was no evidence that the prosecutions were originated by traditional police agencies or that police were unable or unwilling to investigate the defendants' activities. Because the actions of the SAFE investigator exceeded statutory authority, the trial acted properly by granting the defendants' motions to suppress.

(Defendant Saxen was represented by Assistant Defender Dimitri Golfis, Ottawa.)

§44-8(b)

People v. Valle, 2015 IL App (2d) 131319 (No. 2-13-1319, 6/11/15)

The curtilage is the land immediately surrounding and associated with the home, and it is considered part of the home for Fourth Amendment purposes. Accordingly, a warrant to search a defendant's home necessarily includes the curtilage.

The police obtained a warrant to search defendant's home and in executing the warrant discovered contraband in his detached garage. Defendant argued that the search was illegal since the warrant did not authorize searching the detached garage.

The Court disagreed, holding that the police had authority to search the detached garage since it was within the home's curtilage. The Court disagreed with **People v. Freeman**, 121 Ill. App. 3d 1023 (2d Dist. 1984), which held that a warrant to search a home did not extend to a detached garage, calling the decision "legally unsound."

§44-12(c)

People v. Pulling, 2015 IL App (3d) 140516 (No. 3-14-0516, 6/17/15)

A traffic stop is an investigative detention and may not last longer than necessary to effectuate the purpose of the stop. An initially lawful seizure can become illegal if it is prolonged beyond the time reasonably required to complete the stop.

An officer lawfully stopped the car in which defendant was a passenger, and began preparing citations for speeding and driving on a suspended license. Approximately four minutes into the stop, the officer had all the information needed to issue the citations when he became suspicious of inconsistencies in the answers defendant and the driver gave. The officer stopped writing the citations and conducted a free-air sniff for drugs, eventually discovering contraband in the car.

The Court held that the free-air sniff was illegal. The officer deviated from the purpose of the traffic stop to conduct a drug investigation that was not supported by independent reasonable suspicion, and thereby unlawfully prolonged the duration of the stop. Although the drug search occurred before the traffic stop had ended, the "positional" point at which the search occurred did not change the outcome.

The trial court's judgment suppressing the evidence was affirmed.

§44-15

City of Los Angeles v. Patel, ___ U. S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2015) (No. 13-1175, 6/22/15)

A Los Angeles city ordinance required that hotel operators record certain guest information including, among other things, name and address, vehicle information, and payment information. In some cases, operators were required to check photo identification and to record the type and expiration date of the identification document. The ordinance also required that such records be made available for inspection upon demand by any Los Angeles police officer, and created a misdemeanor punishable by up to six months in jail and a $1000 fine for failing to comply with a demand for inspection.

A group of hotel operators brought a Fourth Amendment facial challenge to the requirement that the records be made available for inspection on demand. The court concluded that the ordinance violated the Fourth Amendment.

1. A facial challenge attacks a statute itself rather than its application in a particular situation. The court stressed that facial challenges may be brought under "any otherwise enforceable provision" of the Constitution, including the Fourth Amendment. The court described arguments that facial challenges are not permitted on Fourth Amendment grounds as based on misunderstandings of Supreme Court precedent.

A facial challenge to a statute can succeed only if the statute is unconstitutional in all applications. In this regard, the statute is analyzed only in applications where it actually authorizes or prohibits the conduct in question. Thus, a facial challenge to the statute requiring motel operators to provide their records upon request is not defeated because the Fourth Amendment would not be violated if the demand to inspect records was accompanied by consent, a warrant, or exigent circumstances. In such cases, the search would be authorized by the warrant or an exception to the warrant requirement, not by application of the statute concerning motel records.

2. Generally, warrantless searches are improper unless an exception to the warrant and probable cause requirements applies. The court concluded that the search of hotel records qualifies for one such exception - for administrative searches. For the administrative search exception to apply where neither consent nor exigent circumstances are present, the subject of the search must be given the opportunity to obtain precompliance review before a neutral decision maker. Because the statute here did not provide for any avenue of obtaining precompliance review, it was unconstitutional on its face.

The court emphasized that a hotel owner need only be given an opportunity to have precompliance review before a judicial decision maker. Such review need occur only if the hotel operator objects to allowing an inspection of the records.

The court rejected the argument that allowing for precompliance review would be unnecessarily burdensome for police, noting that officers may issue an administrative subpoena on the spot without a showing of probable cause. The subject of the search could then move to quash the subpoena before the search occurs. The court also emphasized that the hotel operators did not challenge the requirement that they keep the records in the first place and that if there was a reasonable suspicion that tampering might occur, officers could safeguard the record during the review.

3. The court rejected the argument that hotels are part of a "closely-regulated industry" and therefore subject to relaxed Fourth Amendment standards. The court noted that only four industries have been recognized as closely-regulated and held that nothing inherent in the operation of a hotel poses a clear and significant risk to public welfare.

SENTENCING

§45-1(a)

People v. Crutchfield, 2015 IL App (5th) 120371 (No. 5-12-0371, 6/29/15)

A statute that has been declared unconstitutional because it was adopted in violation of the single subject rule is void in its entirety, and the legislature may revive the statute only by reenacting the same provision.

Defendant was sentenced to life imprisonment pursuant to 730 ILCS 5/5-8-1(a)(1)(c)(ii), which mandates a sentence of life imprisonment when a person over the age of 17 murders a person under the age of 12. The Appellate Court vacated defendant's sentence since the public act which enacted this sentencing provision (Public Act 89-203) had been declared unconstitutional in violation of the single subject rule (**People v. Wooters**, 188 Ill. 2d 500 (1999)), and the legislature had never reenacted the sentencing provision.

The Appellate Court specifically rejected the State's argument that the legislature cured the single subject violation by enacting Public Act 89-462 which "recodified" the sentencing provisions in another public act that had also been declared in violation of the single subject rule. The Court stated that it found "no indication that Public Act 89-462 addressed the single subject rule violation in Public Act 89-203." Instead it "merely reenacted the change from discretionary to mandatory natural life sentences for certain offenses," and hence did not cure the infirmity of Public Act 89-203.

The Court remanded defendant's case for re-sentencing without applying the mandatory life sentence provision of section 5-8-1(a)(1)(c)(ii).

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

§§45-4(a), 45-4(d)

People v. Minter, 2015 IL App (1st) 120958 (No. 1-12-0958, 6/25/15)

1. The trial court abuses its discretion by considering bare arrests or pending charges as aggravation of a sentence. However, a sentencing court may rely on evidence of other criminal activity, even if that conduct has not resulted in a conviction, where it finds that the evidence is relevant and accurate. A mere listing of arrests or charges in a pre-sentence report, unsupported by live testimony or other evidence, does not constitute relevant and accurate evidence of other criminal activity.

2. The court concluded that the trial court improperly considered defendant's pending charges for possession of contraband and aggravated battery as aggravation when imposing a sentence for armed robbery. The pre-sentence report showed that

defendant had been charged with the two offenses while he was in custody awaiting trial in this case. The State presented no evidence concerning the charges, but argued that they showed defendant had continued to commit acts of violence.

In discussing the aggravating factors, the trial court twice referred to the pending charges and said that defendant had "continued" to commit crimes. Under these circumstances, the trial judge improperly considered the mere fact that defendant had pending charges as aggravating evidence.

3. The court rejected the State's argument that the trial court did not consider the pending charges as aggravation but merely as evidence of the likelihood that defendant would recidivate. The court held that the distinction between considering the charges as aggravation or as evidence of the likelihood of recidivism was "meaningless," because the pending charges could be considered as evidence of likely recidivism only if the trial court assumed that defendant had in fact committed the unproven offenses. One reason for the rule that pending charges may not be considered as aggravation is that the underlying facts have not been proven.

4. Where the trial court considers an improper factor in aggravation, re-sentencing is required unless the reviewing court determines that the weight given to the improper factor was minimal.

Here, the trial court imposed a sentence that was two years greater than the statutory minimum and mentioned only limited factors in aggravation other than the pending charges. In addition, the trial court mentioned the pending charges twice and stated that those charges did not "go well for" defendant. Under these circumstances, the court concluded that the pending charges played more than a minimal role in the sentencing decision. The sentence was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Kate Schwartz, Chicago.)

§45-10(c)(1)

People v. Robinson, 2015 IL App (1st) 130837 (No. 1-13-0837, 6/26/15)

Under 730 ILCS 5/5-8-2(a), a defendant with multiple convictions may normally receive an extended-term sentence only for the convictions within the most serious class of offense. But when there was a substantial change in the nature of the criminal objective, the defendant's offences are part of an unrelated course of conduct and an extended-term sentence may be imposed on a less serious class of offense.

Here the tenant discovered defendant in his apartment trying to steal a television set. When defendant saw the tenant standing near the doorway, he ran at him and the two struggled for several minutes before other individuals detained defendant. Defendant

was convicted of residential burglary and aggravated battery, and was sentenced to extended-term sentences on both offenses, even though aggravated battery was a lesser class of offense.

The Appellate Court held that the trial court erred in imposing an extended-term sentence for aggravated battery. Defendant's actions in fighting with the tenant did not constitute a substantial change in the nature of his criminal objective. Instead, the Court held that a burglar maintains a constant objective to escape throughout the burglary. When the tenant discovered defendant, he was near the doorway blocking defendant's only means of escape. The struggle with the tenant which led to the aggravated battery conviction, was merely a means to effectuate defendant's objective of escaping, and thus there was no change in criminal objective.

The Court reduced defendant's sentence to the maximum of five years for a Class 3 felony.

(Defendant was represented by Assistant Defender Kristen Mueller, Chicago.)

STATUTES

§48-1

People v. Olsen, 2015 IL App (2d) 140267 (No. 2-14-0267, 6/5/15)

Section 30(c) of the State Police Act provides that in-car video recording equipment shall record activities outside a patrol case when an officer (1) is conducting an enforcement stop or (2) reasonably believes a recording may assist the prosecution, enhance safety, or for any other lawful purpose. 20 ILCS 2610/30(c).

The police stopped defendant for a traffic violation and performed field sobriety tests on defendant. Although the in-car video was running, the officer, for safety reasons, conducted the sobriety tests in front of defendant's car so that none of the tests were capable of being seen on the video recording. Defendant argued that the officer's failure to record the sobriety tests amounted to "spoilation of evidence" by failing to "properly preserve evidence" as required by the statute. As a remedy, defendant requested that the court suppress all of the officer's observations during the tests.

The consequences of failing to comply with a statute's command is determined under the directory/mandatory dichotomy. Statutes are mandatory if the statute dictates a particular consequence for noncompliance. In the absence of a specific consequence, the statute is directory and no particular consequence flow from noncompliance. Statutes are also mandatory if the right the statute is designed to protect would generally be injured under a directory reading.

The Appellate Court held that the statute here was directory. It did not dictate a particular consequence for noncompliance and it did not generally injure a defendant's right to a fair trial. The purpose of recording traffic stops is to assist in the truth-seeking process by providing objective evidence of what occurred. The recordings could be useful to both the State and defendant. Since the recording could help or hinder either party, defendant's right to a fair trial would not be generally injured under a directory reading.

The trial court's order suppressing the evidence was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

§48-4

People v. Crutchfield, 2015 IL App (5th) 120371 (No. 5-12-0371, 6/29/15)

A statute that has been declared unconstitutional because it was adopted in violation of the single subject rule is void in its entirety, and the legislature may revive the statute only by reenacting the same provision.

Defendant was sentenced to life imprisonment pursuant to 730 ILCS 5/5-8-1(a)(1)(c)(ii), which mandates a sentence of life imprisonment when a person over the age of 17 murders a person under the age of 12. The Appellate Court vacated defendant's sentence since the public act which enacted this sentencing provision (Public Act 89-203) had been declared unconstitutional in violation of the single subject rule (**People v. Wooters**, 188 Ill. 2d 500 (1999)), and the legislature had never reenacted the sentencing provision.

The Appellate Court specifically rejected the State's argument that the legislature cured the single subject violation by enacting Public Act 89-462 which "recodified" the sentencing provisions in another public act that had also been declared in violation of the single subject rule. The Court stated that it found "no indication that Public Act 89-462 addressed the single subject rule violation in Public Act 89-203." Instead it "merely reenacted the change from discretionary to mandatory natural life sentences for certain offenses," and hence did not cure the infirmity of Public Act 89-203.

The Court remanded defendant's case for re-sentencing without applying the mandatory life sentence provision of section 5-8-1(a)(1)(c)(ii).

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

VERDICTS

§55-2

People v. Peoples, 2015 IL App (1st) 121717 (No. 1-12-1717, 6/30/15)

1. The State charged defendant with first degree murder and a firearm enhancement alleging that he personally discharged a firearm that proximately caused death. Six witnesses testified at trial that the fatal shots were fired from a white van. Three of those witnesses identified defendant as being one of the men in the van and of those three, two testified that defendant fired a gun. The State charged defendant as the principal and argued that he personally fired the fatal shots. The State never argued or pursued a theory at trial that defendant was accountable for the shooting and did not request accountability instructions.

During deliberations, the jury sent a note asking whether someone can be guilty of murder and "not pull the trigger." The note further stated that "we are struggling with the concept of a guilty verdict but not having enough evidence that shows or proves [defendant] was the shooter." Over defendant's objection, the court answered the jury's question: "Dear Jury, the answer is Yes." Five minutes later the jury found defendant guilty of first degree murder, but acquitted him of the firearm enhancement.

2. The Appellate Court held that the trial court's response to the jury's question was incorrect. Under the facts of this case, where the State never pursued a theory of accountability at trial, it was improper to instruct the jury that it could convict on a theory of accountability. The Court also found that the error was not harmless beyond a reasonable doubt. There was a serious risk that defendant was convicted on a theory never presented to the jury and which defendant never had a chance to contest.

3. The Court, however, did not find that the error required an outright reversal of defendant's conviction. Although the guilty verdict on first degree murder conflicted with the acquittal of the firearm enhancement, legally inconsistent verdicts do not mandate outright reversal of a conviction. And even though the facts of this case strongly suggested that the jury did not believe defendant was the "principal shooter," such a conclusion would still be speculation, and a reviewing court "may not guess as to why a jury did what it did, no matter how obvious it may seem."

The Court remanded the case for a new trial.

(Defendant was represented by former Assistant Defenders Patrick Morales-Doyle and Rachel Moran, Chicago.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-2(b)(1)(a)
People v. Ulloa, 2015 IL App (1st) 131632 (No. 1-13-1632, 6/30/15)

To prove the offense of conspiracy to deliver cocaine, the State must prove that defendant himself agreed to the delivery. 720 ILCS 570/405.1. The State cannot prove conspiracy to deliver by showing that defendant was accountable for the actions of another person who agreed to the delivery. The trial court thus committed plain error under both the closely balanced evidence and serious error prongs by instructing the jury that they could find defendant guilty of conspiracy under a theory of accountability.

WITNESSES

§57-6(b)(1)
Ohio v. Clark, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2015) (No. 13-1352, 6/18/15)

1. The Sixth Amendment Confrontation Clause generally prohibits the introduction of testimonial statements by a witness who does not testify at trial. Under the "primary purpose" test, statements elicited through interrogation are testimonial when the circumstances objectively indicate that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

When the primary purpose of the interrogation is to respond to an ongoing emergency, its purpose is not to create a record for trial and thus statements elicited in response to such interrogation are not prohibited by the Confrontation Clause. But the "existence *vel non* of an ongoing emergency" is not the end of the inquiry; it is just one factor in the ultimate question about the primary purpose of the interrogation.

2. Teachers at L.P.'s preschool observed suspicious marks on his body and asked him who was responsible. L.P., who was three years old, eventually made statements to the teachers implicating defendant. These statements were introduced at trial, but L.P. did not testify. Defendant argued that the statements were testimonial and thus prohibited by the Confrontation Clause.

3. The Supreme Court held that the statements were not testimonial. The Court declined to adopt a categorical rule that statements made to persons other than law enforcement officers are never testimonial. But, such statements are much less likely to be testimonial. And considering all the relevant circumstances in this case, L.P.'s statements "clearly were not made with the primary purpose of creating evidence for [defendant's] prosecution," and thus were not barred by the Sixth Amendment.

First, the statements were made in the context of an ongoing emergency about suspected child abuse. When the teachers saw the injuries, they needed to know whether it was safe to release L.P. to his guardian at the end of the day. Their immediate concern was to protect L.P. by identifying and ending the abuse.

Second, there was no evidence that the primary purpose was to gather evidence for defendant's prosecution. The teachers never informed L.P. that his answers would be used to arrest or punish the abuser, and L.P. never indicated that he intended his statements to be used in a prosecution.

Third, L.P.'s young age contributed to the finding that the statements were not testimonial. "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." Few three-year-old children understand the criminal justice system and it is unlikely that someone that young would intend his statements to be a substitute for trial testimony.

Finally, the Court found it highly relevant, if not categorically dispositive, that L.P. was speaking to teachers rather than law enforcement officers. Statements to persons who are not "principally charged with and uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers."

In light of all these circumstances, the Court held that the introduction of L.P.'s statements did not violate the Sixth Amendment.

4. The Court specifically rejected two of defendant's arguments. First, Ohio's mandatory reporting obligations for teachers did not turn their questions into the equivalent of police interrogation. Even with this obligation, the teacher's overriding concern "was to protect L.P. and remove him from harm's way." Such reporting statutes cannot convert concerned questions from a teacher "into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Second, the Court refused to view this issue from the jury's perspective. Doing so would make virtually all out-of-court statements testimonial. The prosecution typically offers those statements when they support its case, and in this context, the context the jury sees, all such statements could be viewed as testimonial. But the Court has never suggested that the Confrontation Clause bars all out-of-court statements that support the prosecution's case. Such a broad rule would eliminate the primary purpose test.